

# EXHIBIT A

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

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7 SEARS HOLDINGS CORPORATION,

8

9 Debtor.

10 - - - - - x

11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 February 14, 2019

17 10:03 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: NAROTAM RAI

1 HEARING re Notice of Agenda of Matters Scheduled for Hearing  
2 on February 14, 2019

3  
4 Motion to Extend Exclusivity Period for Filing a Chapter 11  
5 Plan and Disclosure Statement / Motion of Debtors Pursuant  
6 to Section 1121(d) of the Bankruptcy Code to Extend  
7 Exclusive Periods (document #2312)

8  
9 Limited Objection of the Official Committee of Unsecured  
10 Creditors (document #2544)

11  
12 Motion Midwood Management Corp. to Confirm Termination or  
13 Absence of Stay Motion for Order Declaring Automatic Stay  
14 Inapplicable to Non-Residential real Property Lease  
15 (document 932)

16  
17 Debtors' Objection (document #2497)

18  
19 Midwood Reply (document #2578)

20  
21 Motion to Confirm Termination or Absence of Stay Motion for  
22 Order Declaring Automatic Stay Inapplicable to Non-  
23 Residential Real Property Lease filed by Veronique Urban on  
24 behalf of Midwood Management Corp. (document #932)

25

1 Motion to Compel Immediate Payment of Postpetition  
2 Arrearages; Granting an Administrative Claim; and Compelling  
3 Debtors to Assume or Reject Agreement (document #1477)

4

5 Motion of Milton Manufacturing, LLC to (I) Compel the Debtor  
6 to Assume or Reject Purchase Orders Related to Craftsman  
7 Branded Goods Ordered by the Debtor Being Warehoused in  
8 Taiwan, and (II) Grant Related Relief filed by Joel D.  
9 Applebaum on behalf of Milton Manufacturing, LLC (document  
10 #1479)

11

12 Debtors' Objection (document #2481)

13

14 Debtors' Objection (document #1547)

15

16 Motion for Relief from Stay to Allow Civil Litigation in  
17 Action (1) and for Action, (2) To Proceed, and for the  
18 Parties to Proceed with Alternative Dispute Resolution (ADR)  
19 and Settlement Negotiations to which had Begun Since July  
20 27, 2018, with Certificate of Service (document #1006)

21

22 Response of Cyrus Capital Partners, L.P. (document #2470)

23

24 Limited Objection of OCO Capital Partners, L.P. (document  
25 #2471)

1 Joinder of Och-Ziff Capital Structure Arbitrage Master Fund,  
2 Ltd. (document #2474)

3

4 Ex-Parte Motion of the Official Committee of Unsecured  
5 Creditors for the Entry of an Order Pursuant to Bankruptcy  
6 Code Sections 105 and 1103 and Bankruptcy Rules 2004 and  
7 9016, Authorizing the Examination of the CDS Participants  
8 (document #1557)

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Okay, good morning.

3 In re Sears Holdings Corporation.

4 MR. SCHROCK: Good morning, Your Honor. Ray  
5 Schrock of Weil Gotshal & Manges. I'm here on behalf of the  
6 Debtors. It's good to be in front of you again, Your Honor,  
7 with a substantially smaller audience.

8 THE COURT: Yes, we could have used the other  
9 courtroom, but in any event, here we are.

10 MR. SCHROCK: Your Honor, first on the agenda is  
11 the Debtors' Motion to Extend the Exclusivity Period. As we  
12 notified your Chambers yesterday, we did resolve the limited  
13 objection of the Official Unsecured Creditors Committee.

14 THE COURT: Great.

15 MR. SCHROCK: I have a revised order. May I  
16 approach?

17 THE COURT: So, it's, in essence, a 60-day  
18 extension?

19 MR. SCHROCK: It's a 60-day extension, Your Honor,  
20 it's a -- we agreed to provide an update on the plan  
21 process, which we would anyway, at the next omnibus hearing  
22 on March 21st, and for the record, of course, we're going to  
23 agree to negotiate with the UCC on the plan in good faith,  
24 which we would always do.

25 THE COURT: Okay.

1 THE COURT: I don't need it. I think that you've  
2 summarized it, unless any of the other parties who  
3 (indiscernible) want to add anything. Okay. So, you can  
4 email that over to Chambers.

5 MR. O'DONNELL: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. SCHROCK: Your Honor, I believe we have a  
8 couple of third-party motions, but in the vein of minimizing  
9 administrative expenses, may I be excused?

10 THE COURT: Yes.

11 MR. SCHROCK: Okay.

12 THE COURT: Okay, thank you. Okay, so, we were  
13 going back to the agenda now, and I think the next matter on  
14 the agenda is the Midwood Management Motion.

15 MR. COLLINS: Good morning, Your Honor. Patrick  
16 Collins, Farrell Fritz on behalf of Midwood Management Corp.

17 THE COURT: Good morning.

18 MR. COLLINS: Midwood Management is the agent for  
19 Expressway Plaza I and Farmingville Associates. They are  
20 the tenants-in-common, the owners of the property out in  
21 Farmington, New York. There's a shopping center there known  
22 as Expressway Plaza. One of the tenants in the shopping  
23 center is Kmart, under a lease entered into in 1991. A copy  
24 of the lease is next to our Motion. We filed the Motion  
25 seeking entry of an order pursuant to § 362(b)(10) of the

1 Bankruptcy Code, declaring that the automatic stay does not  
2 apply to Landlord's efforts to recover the leased premises  
3 from Kmart. The automatic stay does not apply because the  
4 term of the lease is expired. The term expired by operation  
5 of Condition of Limitation provision in the lease, an  
6 uncured pre-petition default, in Landlord's pre-petition  
7 service of a Notice of Election to treat the term of the  
8 lease as expired within ten days on account of a default.

9 THE COURT: Default is a payment default, right?

10 MR. COLLINS: Failure to pay additional rent for  
11 the Landlord's costs to carry out maintenance at the leased  
12 premises, that's correct.

13 THE COURT: Under 25(a) of the lease?

14 MR. COLLINS: Correct. Under New York law, as a  
15 result of the condition limitation, the term of the lease  
16 was shortened upon landlord's service of the Lease  
17 Termination Notice. The term is shortened from the  
18 termination date stated in the lease, to ten days from the  
19 date notice was given.

20 THE COURT: Well, can we stop on that point?

21 MR. COLLINS: Sure.

22 THE COURT: What New York law are you referring  
23 to? I mean, the Debtors dispute whether there actually was  
24 a default, under 25(a) and (f), that would tender the  
25 obligation to pay more of the rent, the roughly over --

1 well, over \$215,000 of additional rent.

2 MR. COLLINS: Correct, it has been --

3 THE COURT: So, what is the -- I mean, that's  
4 still in dispute, so, how did it terminate?

5 MR. COLLINS: It terminated because the Landlord  
6 did not respond to -- the Tenant did not respond to the  
7 Landlord's Notice of Default and opportunity to cure at all,  
8 neither to protest, neither to pay, neither to ask for more  
9 time.

10 THE COURT: Well, it's doing it now. It's  
11 disputed that there was a default.

12 MR. COLLINS: It is doing it now, after the  
13 expiration of the ten-day period in the Lease Termination  
14 Notice. If the Court rules that § 362(b)(10) were to apply,  
15 we would, of course, then go to State Court and commence a  
16 Landlord-Tenant Action to evict Kmart, and Kmart can arrange  
17 whatever defenses it wants in the Landlord-Tenant Action.

18 THE COURT: So, the reason I asked is, I don't  
19 think you cited to me any New York cases that stand for the  
20 proposition that, if the Debtor disputes the underlying  
21 default that causes the conditional termination, the  
22 Landlord automatically has the right to assume that the  
23 lease is terminated for all purposes. Doesn't it have to be  
24 a Court determination of that dispute?

25 MR. COLLINS: As I said, the right of Kmart to

1 contest the default is still there. They can assert that in  
2 State Court, if they so choose.

3 THE COURT: Okay. All right, so --

4 MR. COLLINS: Or here, if it -- or here.

5 THE COURT: -- what is the -- but then it hasn't  
6 terminated, because that dispute still is live, isn't it?

7 MR. COLLINS: No, it's terminated, depending on  
8 who's right and who's wrong.

9 THE COURT: But I know, but that hasn't been  
10 decided yet, so it's hard for me to see how it's actually  
11 terminated, since that issue is still an open issue.

12 MR. COLLINS: I guess, my view is that if the  
13 Landlord is correct, the lease is terminated.

14 THE COURT: Well, that's right, and if the Debtor  
15 is correct, it hasn't.

16 MR. COLLINS: That's right.

17 THE COURT: So, it's hard to say it has  
18 terminated, because it's an open issue.

19 MR. COLLINS: But the events have already  
20 occurred. I mean, the events --

21 THE COURT: That's fair.

22 MR. COLLINS: -- the events that will lead to a  
23 determination as to whether the lease is terminated or not  
24 have already occurred.

25 THE COURT: But you're saying it actually has

1 terminated.

2 MR. COLLINS: Yes.

3 THE COURT: Are you asking me for a determination  
4 today that it has?

5 MR. COLLINS: I'm asking the Court for a  
6 determination of § 362(b)(10), under that provision, that  
7 the automatic stay does not apply because the lease is  
8 terminated.

9 THE COURT: But, are you asking on the basis of  
10 saying that you want me to decide whether your client is  
11 correct that there was, in fact, the default that gave rise  
12 to the payment obligation, or that -- or, in the  
13 alternative, that the Debtor is correct and I need to decide  
14 that issue, or are you basically saying that I should assume  
15 that, if the Landlord asserts there's a default, then that's  
16 enough for a termination?

17 MR. COLLINS: We don't dispute that the issue  
18 needs to be decided somewhere.

19 THE COURT: All right.

20 MR. COLLINS: And that can be here, that can be in  
21 Landlord-Tenant court in State Court.

22 THE COURT: All right. So, it doesn't seem to me  
23 that it's actually terminated.

24 MR. COLLINS: Once again, I --

25 THE COURT: For the purposes of this hearing.



1 MR. COLLINS: Well, I --

2 THE COURT: Which -- I'm not trying to get you to  
3 say that your position is incorrect. I fully understand  
4 your position. All I'm saying is, it doesn't seem to me  
5 that it actually has terminated because there's still an  
6 open issue.

7 MR. COLLINS: It's still an open issue, but there  
8 are open issues in the other cases where courts --

9 THE COURT: Actually, I disagree with that  
10 completely. And I also disagree with the meaning of §  
11 362(b) (10), which doesn't say, "has terminated," it says,  
12 "stated term".

13 MR. COLLINS: Correct.

14 THE COURT: When I look at the lease, the term of  
15 the lease is stated in Paragraph 2, not in Paragraph 25.

16 MR. COLLINS: But that's what Policy Realty is all  
17 about, Your Honor.

18 THE COURT: Policy Realty is not really about  
19 that. Policy Realty is about the fact that when a lease  
20 terminates for any reason --

21 MR. COLLINS: Right.

22 THE COURT: -- it can't be assumed because it's no  
23 longer a lease. That's different than (b) (10). At least,  
24 that's what the editors of Collier's say, and the majority  
25 of cases.

1 MR. COLLINS: But Policy Realty dealt with the  
2 conditional limitation that -- that's the nature of a  
3 conditional limitation, it shortens --

4 THE COURT: That has already been decided.

5 MR. COLLINS: -- it shortens the terms of the  
6 lease.

7 THE COURT: There are two different points.

8 MR. COLLINS: Right, okay.

9 THE COURT: And, frankly I don't think this was  
10 necessary for the decision in Policy Realty, or, I don't  
11 think, even briefed to the District Court or the Court of  
12 Appeal -- or the Second Circuit. There -- and Collier's  
13 makes this clarification, too: there are two different  
14 concepts pertaining to termination of a lease than the  
15 Debtors' ability to continue with the lease. Concept one is  
16 really the concept that was issue in Policy Realty, which  
17 is, you can't assume a lease that is over, that is done, and  
18 you know it's done, because there's no remaining issue. You  
19 can't create a new lease, in other words, you have to live  
20 with the lease you have. That's a function of just the  
21 definition in § 365, which is the word, "lease". If you  
22 don't have a lease anywhere because it's over, you don't  
23 have it.

24 So, the case law is quite clear, you can't revive  
25 a lease if it's over, although, even there, the courts say,

1 under New York law, you actually can revive a lease under  
2 RPAPL 749 because there's an ability to go back to State  
3 Court and say, we consider the issuance of the word,  
4 "eviction," Judge, the Debtor is ready to assume the lease  
5 under 365, and there are plenty of cases that deal with  
6 that: Mad Lolo, Joker Enterprises, et cetera. That's one  
7 set of issues, is the lease over or not?

8 There's a separate set of issues, which are  
9 covered by § 362(b)(10), and § 541(b)(2), and that's a much  
10 more limited provision that says, if the lease is expired by  
11 its stated term, not that it is terminated, but expired by  
12 its stated term, then the stay doesn't apply and it's not  
13 property of the Estate. Now, it's pretty easy for people to  
14 figure out, including judges. Even judges could figure this  
15 out, that if a lease runs for ten years, that's its stated  
16 term, the lease runs for ten years, and you're now in Year  
17 11, the lease is over its stated term, it's over. And  
18 Congress said, well, at least in those circumstances, we're  
19 not going to engage in any more speculation. It's over.

20 That's what, I think, § 362(b)(10) and the same  
21 provision in 541, are dealing with, not a conditional  
22 termination or consequential termination, which are dealt  
23 with in the cases that deal with whether you still have a  
24 lease or not. But, all of those cases, and it's the same  
25 under New York law, that's why we have Yellowstone

1 injunctions, is, if a landlord says the lease is over  
2 because you've defaulted and we have this default provision,  
3 we can send a notice and if it's not cured, then the lease  
4 is terminated, that's a whole separate set off issues where  
5 you have controversies. You have them all the time. You  
6 know, no, Judge, there wasn't a default, you know, they --  
7 this is a pretext. We've been living up to our lease. And  
8 so, that's a whole separate set of issues, and those leases  
9 aren't over until it's over. And that has to be decided by  
10 someone. I don't -- I believe -- I know there are a few  
11 cases going the other way, but I believe that Congress  
12 understood that distinction, and by using the phrase,  
13 "stated term," made it.

14 So, I think you're absolutely right that Policy  
15 Realty stands for the proposition that if the lease really  
16 is over, for whatever reason, whether it's because the  
17 stated term has run, or because there's a you know, a  
18 consequential termination, the Debtor can't revive it,  
19 although, frankly, there's a lot within that phrase, "the  
20 lease is over," because we know that it actually can be  
21 revived, even if the Warrant of Eviction is issued, because  
22 that's what Mad Lolo and 749 of the RPAPL say. But, in  
23 Policy Realty, that's what it was: it was a consequential  
24 breach, it wasn't a term breach, and it was over. I  
25 appreciate that they quote -- they cite 362, but they didn't

1 need to, and I think if anyone had actually made the  
2 argument to them, they would have gotten it, and I view that  
3 application as dicta, as far as § 362(b)(10) and §  
4 541(a)(2), though. It's just a separate -- it's not  
5 necessary, and it's against the majority of case law, the  
6 leading commentator, and the plain language of the statute.

7 MR. COLLINS: I would point out to you, it's a  
8 District Court decision that was affirmed by the Second  
9 Circuit.

10 THE COURT: I know, but it didn't -- it's dicta on  
11 that point, because the lease was over.

12 MR. COLLINS: But the reason --

13 THE COURT: And the law is really clear, that if  
14 you know the lease is over, if there's no issue about the  
15 dispute, then -- I'm not alone in this. In the Artisanal  
16 case, Judge Garrity reached the same result. It's not over.  
17 It's a consequential default, it's disputed. And there are  
18 plenty of other judges that have done the same thing.

19 MR. COLLINS: Understood. But I would submit that  
20 the reasoning of Policy Realty is sound. I mean, that's  
21 what a conditional limitation is.

22 THE COURT: It's totally sound in terms of the  
23 proposition that, if a lease is truly terminated, for  
24 whatever reason, then it cannot be revived. That's -- it's  
25 totally sound on that point. And that's what the -- you

1 know, everything else under that case is dicta.

2 MR. COLLINS: On Policy Realty, it hadn't  
3 completely terminated as of the filing date. The TRO is  
4 said to expire later that day, so --

5 THE COURT: But there was nothing to do. There  
6 was nothing -- there's no way to extend it. There was no  
7 dispute about the default. They were done, and they weren't  
8 in possession.

9 MR. COLLINS: And they were not in possession.

10 THE COURT: So, it's -- you know, it's -- listen,  
11 you may appreciate that this is not the first time I've  
12 dealt with these arguments.

13 MR. COLLINS: Mm hmm.

14 THE COURT: And that I think that, obviously,  
15 landlord attorneys love Policy Realty, and they frequently  
16 cite it for more than it stands for. I don't blame them for  
17 doing that, but you know, it's -- the statute's clear, I  
18 believe. We have to decide this issue, whether there's a  
19 consequential default, eventually --

20 MR. COLLINS: You mentioned Artisanal and Lolo,  
21 Your Honor.

22 THE COURT: Right.

23 MR. COLLINS: In both of those cases, the outcome,  
24 in both of those cases, was that the Court ruled that §  
25 362(b) (10) did not apply --

1 THE COURT: Right.

2 MR. COLLINS: -- but that the stay was lifted --

3 THE COURT: Right.

4 MR. COLLINS: -- to allow litigation somewhere to  
5 determine --

6 THE COURT: That's right.

7 MR. COLLINS: -- to determine the underlying  
8 issue, so --

9 THE COURT: But you haven't sought that relief.

10 MR. COLLINS: Well, because -- because 362 --  
11 well, because the Sonnax Factors that they cited were in a  
12 different context.

13 THE COURT: I know, but there's no motion for a  
14 relief of the stay in front of me.

15 MR. COLLINS: The Court has discretion to award  
16 alternate remedies in the course of the outcome, here.

17 THE COURT: Well, I don't know -- I haven't even  
18 looked at that. Is there an arbitration provision in the  
19 lease, for example? I don't know, if there's some sort of  
20 ABR in the lease that would be relevant to me? Related to  
21 that, I don't even know when this lease is stated to be  
22 assumed, or are they looking to reject it? I mean, that's  
23 clearly a Sonnax Factor. There's no reason to send this to  
24 a State Court litigation if it's going to be rejected  
25 anyway. Then, I'm just -- then I would decide the damages,

1 if you really want to pursue them, through a proof of claim.  
2 So, I think it's premature to -- I mean, I understand why  
3 you didn't move for the stay, because I think it's  
4 premature.

5 MR. COLLINS: So, as long as our rights to -- as  
6 to the issue as to whether the lease is terminated is  
7 preserved, Your Honor.

8 THE COURT: Oh, clearly. Clearly is, and you may  
9 -- you may be right about that, ultimately. It may be that  
10 your client was perfectly within its rights to declare an  
11 emergency and do the parking lot work and bill \$215,000 at  
12 18 percent interest, which actually, where is that  
13 provision, the 18 percent provision?

14 MR. COLLINS: In 25(f), Your Honor.

15 THE COURT: Okay. All right.

16 MR. COLLINS: If you keep reading, it says that --

17 THE COURT: All right. So, it may be perfectly  
18 appropriate, but it's a -- given the emails, the Debtors did  
19 dispute it when it first -- when they first got the notice.

20 MR. COLLINS: Yeah, we don't read the emails that  
21 way.

22 THE COURT: Well, I mean, the guy says, we don't  
23 think it's an emergency.

24 MR. COLLINS: Well, the work was done, and they  
25 don't dispute that the work needed to be done.



1           THE COURT: I don't know. You know, that's for  
2 another day, I think. So, I will deny the Motion insofar it  
3 seeks a declaration that the stay doesn't apply to the  
4 Landlord's actions to terminate the lease, and to enforce  
5 its rights under the lease, including eviction, and related  
6 proposition that, under § 541, the lease isn't property of  
7 the Estate. That denial, though, is clearly without  
8 prejudice to the Landlord's contention that, on a proper  
9 record, with you know, proper procedures, which I'm assuming  
10 would include discovery under the Part VII rules, that, in  
11 fact, the default that resulted in the assertion that  
12 another \$215,000 and change was owing, in fact, did occur,  
13 and was -- that there's no defense to that default.

14           There is a related proposition that I haven't  
15 given a whole lot of thought to, which is that the default  
16 here is a payment default, and the Notice in respect of the  
17 termination because of the payment default, didn't occur  
18 until the post-petition period. You may well have a  
19 response to that. I think I understand what it is, but that  
20 may affect the analysis, too, as opposed to a performance  
21 default that, frankly, can't -- you know, you can't rewrite  
22 that, if it, in fact, occurred. But I'm going to, therefore  
23 -- you know, the Debtor can send in an Order to that effect.  
24 They should run it by you to make sure, you know, the  
25 reservation -- I'm not a big one on reserving rights, but I

1 think it's worth putting into the Order here.

2 MR. COLLINS: I think the ruling is clear that the  
3 right to argue that the lease is terminated is preserved,  
4 and I --

5 THE COURT: Absolutely is.

6 MR. COLLINS: -- I appreciate it, Your Honor.

7 THE COURT: But I -- just to close out the record  
8 on this, then, the Motion before me seeks a determination  
9 that the lease between the parties here terminated, for  
10 purposes of § 363(b)(10), either -- well, in fact, it  
11 terminated post-petition. But § (b)(10) says that the  
12 filing of a petition under the Bankruptcy Code does not  
13 operate as a stay under subsection (a) of this section, of  
14 any act by a Lessor, under a lease of non-residential real  
15 property, that has terminated by the expiration of the  
16 stated term of the lease before the commencement of, or  
17 during a case under this title, to obtain possession of such  
18 property. I'm going to go back and emphasize the phrase:  
19 "and has terminated by the expiration of the stated term of  
20 the lease". The leading treatise on bankruptcy, Collier on  
21 Bankruptcy, notes, at Paragraph 362(b)(10), quote: "It  
22 should be noted that this exception is limited to leases  
23 under which the stated term expires, not to leases  
24 terminated for other reasons. Leases completely terminated  
25 pre-petition should not be considered property of the Estate

1 because the Debtor retains to legal or equitable interest  
2 after termination, expect, perhaps, possession, to which the  
3 automatic stay would apply. However, a Lessor should be  
4 stayed from terminating a lease for non-payment of rent, or  
5 other cause, after commencement of a bankruptcy case.  
6 Moreover, the Lessor remains stayed from seeking to retake  
7 the premises, even after automatic termination of a lease  
8 upon an event of default the termination occurs post-  
9 petition. Only when the termination is based on expiration  
10 of the agreed term of the lease, may the stay be  
11 disregarded," close quote.

12 The most recent case to construe this section, and  
13 there's a parallel section in § 541(b)(2) of the Bankruptcy  
14 Code, I think, is in re Hotel Equities, LLC, 586 B.R. 870  
15 (Bankr. E.D. Mich.) 586 B.R. -- I'm sorry, 2008. Now, in  
16 that case, the lease actually did terminate pre-petition,  
17 but not because of the expiration of its stated term. It  
18 terminated because of the consequential termination  
19 provision for a breach, and the Court there noted that a  
20 number of courts have taken the position that termination,  
21 under those circumstances, fits within § 362(b)(10), but  
22 takes the view with, I think, the majority of the courts in  
23 Collier's that (b)(10), by its plain terms, is much more  
24 narrow, and just refers to the stated term of the lease, as  
25 opposed to a consequential termination or simple

1 termination. The law is somewhat confused in some of the  
2 cases cited for the contrary proposition that the Michigan  
3 Court disagreed with. They exacerbate that confusion by the  
4 two very related concepts that are articulated by Collier's.  
5 One is, termination of a stated term, the other is  
6 termination because the lease is over, in other words, for a  
7 consequential default.

8 And that's complicated here by the fact that the  
9 actual termination did occur post-petition, although the --  
10 for a payment default, although the notice was sent pre-  
11 petition, following a Default Notice that was pre-petition.  
12 But, as I said during your oral arguments, I think some of  
13 those cases that don't make the distinction that Collier's  
14 makes, and I think that the statute requires, rely, in large  
15 part, on *in re Policy Realty Corp.*, 2000 U.S. App. LEXIS  
16 8846 (2d Cir. May 2, 2000) in the lower Court District Court  
17 opinion that appears at 242 B.R. 121 (S.D.N.Y. 1999).

18 But in that case, there was really nothing left,  
19 and the Debtor didn't have possession anyway, so, the second  
20 proposition stated by Collier's applies, in the application  
21 of § 362(b)(10), I view, as dictum. That, I believe, is  
22 confirmed by a number of opinions, including Judge Garrity's  
23 opinion recently in, *in re Artisanal 2015, LLC.*, which is at  
24 2017 Bankr. LEXIS 3813, (Bankr. S.D.N.Y. Nov. 3, 2017) at  
25 pages 29-33, and Judge Garrity's discussion about how, under

1 New York law, the issue of consequential defaults, which  
2 this is -- which is what this is, in the facts before me,  
3 are dealt with through the Yellowstone injunction process  
4 and, even under that process, the fact that a Yellowstone  
5 injunction expires does not mean that the lease has been  
6 terminated as a result of the consequential default because  
7 there has not yet been a determination by a Court that the  
8 default occurred.

9 As stated by Warren's Weed New York Real Property,  
10 § 82.30, subparagraph 281: "A tenant served with a notice to  
11 cure an alleged violation of a lease has two options. She  
12 can either comply with the landlord's demands or litigate  
13 the matter. However," with the landlord's -- "complying  
14 with the landlord's demands can be burdensome, however, the  
15 lease contains a conditional limitation permitting the  
16 landlord to terminate the lease in the event of a tenant's  
17 failure to cure the breach prior to the deadline for the  
18 cure, the tenant who fails to cure in time will be subject  
19 to eviction." But then, and this is the important part of  
20 the section: "In the event the Court ultimately determines  
21 that the tenant's conduct constituted a breach of the  
22 lease." That hasn't happened here yet. There hasn't even  
23 been a Warrant of Eviction. There hasn't been a lawsuit  
24 started over the dispute.

25 So, the lease here, I believe, until the dispute

1 is resolved some way, and it may be resolved very quickly  
2 under some of the theories that the landlord stated in its  
3 reply brief, but until the dispute is resolved, the lease is  
4 not terminated under the default provisions, and therefore,  
5 can still be a live lease where the automatic stay applies.  
6 That is separate and apart from the fact that the Debtor  
7 here is still in possession, unlike the Debtor in Policy  
8 Realty. Now, their possession may well simply lead to a  
9 very quick lift stay order, but it's not, arguably, covered  
10 by Policy Realty either. But I think the main point is  
11 that, there is a live lease until the dispute is decided,  
12 and therefore the stay still applies. § 362(b)(10) doesn't  
13 apply, it's still property of the Estate, 541(b)(2),  
14 therefore, doesn't apply, and the Motion will be denied on  
15 that basis.

16 I'll note that, whether a live lease is or isn't -  
17 - whether a lease is still alive or not, is a tricky  
18 question, even after the issuance of a Warrant of Eviction,  
19 given that courts in the Southern District have permitted  
20 Debtors, even after the issuance of a Warrant of Eviction,  
21 that have convinced the judge to approve assumption on the  
22 condition of their warrant being vacated under § 749 of  
23 R.P.A.P.L., that the court will still keep the stay in place  
24 to let the Debtor under appropriate circumstances, go back  
25 to State Court and seek the vacatur of the Warrant of

1 Eviction, as discussed by a number of courts, including  
2 Judge Glenn in the Mad Lolo case that the parties have  
3 cited. So, I'm going to ask the Debtors to prepare an  
4 order, as I said, and they should run it by you before  
5 submitting it to Court.

6 MR. COLLINS: One housekeeping matter, Your Honor.  
7 The Debtor has been paying, and the landlord has been  
8 accepting --

9 THE COURT: I think the landlord should certainly  
10 feel free to cash the check without prejudice to these  
11 rights.

12 MR. COLLINS: Yeah, the --

13 THE COURT: You're not going to getting lured into  
14 a finding that you've waived the default by cashing a check.

15 MR. COLLINS: We would ask that that premise be  
16 applied to the real estate taxes, which are now --

17 THE COURT: Well, if it's covered by the lease, I  
18 mean, that's part of the rent. That's -- you know.

19 MR. COLLINS: Thank you, Your Honor.

20 THE COURT: Okay. That doesn't require the Debtor  
21 to pay the \$215,000 because that's -- we don't know whether  
22 that's actually owing or not.

23 MR. COLLINS: I understand.

24 THE COURT: Okay.

25 MR. COLLINS: Thank you, Your Honor.

1 THE COURT: Okay, thank you.

2 MR. FAIL: Thank you, Your Honor. The next item  
3 on the agenda are the Motions filed by Milton Manufacturing,  
4 LLC. I'm not sure if Milton's attorneys -- oh, its  
5 attorneys are here.

6 MS. BENCZE: Yes. Okay. Nola Bencze of Clark  
7 Hill on behalf of Milton Manufacturing, LLC. Your Honor,  
8 we're here on two motions today. The first Motion is to  
9 Compel the Payment of Administrative Expense, Pursuant to §  
10 503(b)(1), or in the Alternative, Pursuant to § 503(b)(9).  
11 I do note --

12 THE COURT: And that's with respect to certain  
13 purchase orders?

14 MS. BENCZE: Correct, Your Honor, certain --

15 THE COURT: Prior to the Motion.

16 MS. BENCZE: -- of the Craftsman -- Craftsman  
17 Tools.

18 THE COURT: Right. That were delivered to Sears  
19 in California on October 18th.

20 MS. BENCZE: Correct, Your Honor.

21 THE COURT: Okay. Pursuant to pre-petition  
22 purchase orders.

23 MS. BENCZE: Right, correct. I mean, I think,  
24 Your Honor, you know, not to sort of jump into it, but I  
25 could jump into it. There doesn't seem to be a dispute that